Petition

81-1848

NO. _____

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY D. BROCK PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE KENTUCKY COURT OF APPEALS

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April 2, 1982

QUESTIONS PRESENTED

I.

WHETHER THE KENTUCKY COURT OF APPEALS PROPERLY APPLIED NEW YORK V. BELTON, 101 S. CT. 2860 __ U.S. __ (1981), ASSUMING NEW YORK V. BELTON CAN BE RETROACTIVELY APPLIED--IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF PETITIONER'S FEDERAL CONSTITUTIONAL FOURTH AMENDMENT RIGHTS.

II.

THE DECISION BELOW APPLYING NEW YORK V. BELTON TO THIS CASE PRESENTS A NOVEL QUESTION OF RETROACTIVITY WHICH IS AN IMPORTANT CONSTITUTIONAL QUESTION IN THE ADMINISTRATION OF JUSTICE. ACCORDINGLY, PETITIONER REQUESTS THIS COURT TO GRANT CERTIORARI TO REVIEW THE JUDGMENT BELOW.

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NO.

IN THE
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LARRY D. BROCK PETITIONER

VS.

COMMONWEALTH OF KENTUCKY RESPONDENT

PETITION FOR WRIT OF CERTIORARI
TO THE KENTUCKY COURT OF APPEALS

The petitioner, Larry D. Brock, respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Kentucky entered on September 25, 1982.

OPINION BELOW

The opinion of the Kentucky Court of Appeals affirming petitioners judgment of conviction was filed on September 25, 1982, Brock v. Commonwealth, Ky. App., 627 S.W.2d 39. (Appendix hereinafter designated App., pp. A2-A10) The order by the Kentucky Supreme Court

denying petitioner's timely filed Petition for Discretionary Review was entered on February 9, 1981. (App., p. A12)

JURISDICTION

The opinion of the Kentucky Court of Appeals was entered on September 25, 1981. Petitioner's Petition for Discretionary Review to the Supreme Court of Kentucky was timely filed on October 14, 1981. (App., p. A11) The Motion for Discretionary Review was denied on February 9, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the Fourth and Fourteenth Amendments to the Federal Constitution.

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

The Fourteenth Amendment to the United States Constitution, in pertinent part:

> . . . nor shall any State deprive any person of liberty . . . without due process of law . . .

STATEMENT OF THE CASE

On April 5, 1979, the petitioner, Larry D. Brock, was indicted in the McCracken Circuit Court for one count of knowingly and unlawfully trafficking in a Schedule III controlled substance by possessing with intent to sell a quantity of phendimetrozine--violation of KRS 218.990. (Transcript of Record, hereinafter designated T.R., p.5)

At a jury trial held on February 11, 12, and 13, 1980, petitioner, despite his plea of not guilty, was convicted of the offense charged in the indictment. (T.R., p.322) The jury fixed petitioner's sentence at ten years in the penitentiary.

Judgment was entered on February 29, 1980. (App., p. A13-A16) Petitioner's Notice of Appeal was filed on March 6, 1980. (App., p. A17)

On January 15, 1980, petitioner had filed a pre-trial motion to suppress certain evidence seized by officers of the Paducah City Police Department. On January 25, 1980, an evidentiary hearing was held on the defense's motion to suppress. (Transcript of Hearing, hereinafter designated T.H., p.1)

The testimony produced at that hearing revealed that at approximately 11:15 a.m. on August 31, 1978, while at McCracken County Courthouse, Officer Carr of the Paducah City Police had received information from an unsubstantiated, confidential informant. (T.H., p.9) Based on this uncorroborated information, Officer Carr met with Officers Pugh, Carter, and Midyett and briefed them on the information that he had received. Officer Carr asked that the other officers be on the lookout for a white van with Illinois license plates. Officer Carr had been told that this van and its passengers, (described as two hippy-types, T.R., p.74), would be participating in a drug transaction at Barkley Park at around 12:00

noon. (T.H., p.4) Further, the driver of the van would have a quantity of pills on his person, which more than likely would be stuffed down the front of his pants.

At approximately noon, Patrolman Pugh spotted a van matching the above description and followed it from 8th Street and Barkley Park, (a distance of approximately five blocks). He pulled behind the van after it had stopped in a parking space in the park, (T.R., p.75), because "they pulled a California type stop on the stop there at 6th and Park, which is, they more or less yielded instead of stopped." (T.H., p.18) However, at the preliminary hearing, and later at trial, the officer testified that he had stopped the van under the pretense of seeing if they were under the influence of alcohol. (T.H., p.9), (T.R., p.75)

Officer Carter arrived right after Patrolman Pugh and found two individuals out of the van. (T.H., p.31) Mr. Linders, (the petitioner's co-defendant and owner of the van), was

talking with Officer Pugh as the petitioner was walking around the back of the van from the passenger's side. (T.H., p.31) Officer Carter's pat-down search of Mr. Brock yielded a hunting knife. (T.H., p.20) Officer Pugh's pat-down search of Mr. Linders yielded a "baggie of pills," from the front of Mr. Linders' pants. (T.H., p.21)

> A. When I found the drugs, or the baggie of pills, we asked them if that was all the drugs they had and then Brock asked him, said, "Do you still have that marijuana in the van?" And Linders said, "Yes," and told us where it was at. It was on the console in the harmonica box, and I asked him, I said, "Do you mind if we get in there?", and he said, "No, I don't mind," and I found the box right where he told me it was at, and there was some stuff in there which I believe to be marijauana, and I showed Officer Carr and he informed me that it was marijuana, so he believed also. (T.H., p.23 & 24)

> A. Well, after the marijuana was discovered, as I had charged Mr. Linders with possession of marijuana and taken him back to the paddy wagon to fill out the citation that we have to make on an arrest like this, I asked him again if we could search

the van and he again replied, "I don't mind. Go ahead."

Q60. So, after he was under arrest, you asked him for permission a second time to conduct a search?

A. Yes. (T.H., p.24)

The officer's first search of the van revealed nothing. (T.H., p.26) It is significant that Officer Pugh further testified that while he had seen the lunch box during the first search which yielded the marijuana, he did not find it to be of a suspicious nature. (T.H., p.29) However, when the second search of the van was conducted, the lunch box containing the pills was discovered. At this point in time, Mr. Linders was under arrest and in custody and Mr. Brock was in Narcotics Officer Carr's automobile being questioned. (T.H., p.27)

There was conflicting testimony, (T.H., p.34, 42, & 46), over the issue of consent; specifically whether or not Mr. Linders had consented to the search of his van. The record is silent as to whether or not the petitioner

ever consented to the search of his lunch box. In fact, the record is silent as to whether or not Mr. Brock was even asked if the police could search his lunch box. At the trial, the Commonwealth relied heavily on the fact that the petitioner's name was conspicuously scratched on the lunch box. (T.R., p.84) Nonetheless, the trial court found that "the conclusions, basically, are that I feel like they had a right to stop the vehicle and also that there was consent search, but even if there were no consent search, that exigent circumstances existed, I think, in this case which would satisfy the due process requirement. (T.R., p.7)

Patrolman Carter testified that he walked through the van and did not look into anything. (T.H., p.37) "I was looking around the van for anything lying out." (T.H., p.37) Officer Carter testified that he saw "Officer Carr enter the van and hand out to Officer Danny Midyett a lunch box." (T.R., p.83) An examination of the contents of the lunch box

revealed several thousand pills containing phendimetrozine. (T.R., p.85-88)

While all of the foregoing was transpiring, one of the officers had called a tow truck. There was some discrepency as to which officer had called for the tow truck, but the testimony uncontravertably reveals that the van was impounded almost immediately after Mr. Linders was arrested. (T.H., p.39)

The trial court overruled Appellant's motion to suppress and allowed the Commonwealth to introduce into evidence the pills found in the lunch box. Based on the unsuppressed evidence, the petitioner was convicted and sentenced to ten years in the penitentiary.

The Kentucky Court of Appeals, glossing over the fact that the van was surrounded by police, that the petitioner and his co-defendant were either in custody or under arrest, and that neither consent nor exigent circumstances existed to allow the search, affirmed the trial court's denial of petitioner's suppression motion. Noting this Court's

July 1, 1981, decision in Robbins v. California, 101 S. Ct. 2841 __ U.S. __ (1982), and New York v. Belton, 101 S. Ct. 2860 __ U.S. __, (1981), the Appellate Court found that "Because Robbins involved the search of a car trunk, we do not feel it is applicable to this case." (App. p.A7) The Court found that "Belton is analagous to the case at hand." (App., p. A8)

REASONS FOR GRANTING THE WRIT

I.

WHETHER THE KENTUCKY COURT OF APPEALS PROPERLY APPLIED NEW YORK V. BELTON, 101 S. CT. 2860 __ U.S. __ (1981), ASSUMING NEW YORK V. BELTON CAN BE RETROACTIVELY APPLIED--IN AFFIRMING THE TRIAL COURT'S ORDER DENYING PETITIONER'S MOTION TO SUPPRESS EVIDENCE SEIZED IN VIOLATION OF PETITIONER'S FEDERAL CONSTITUTIONAL FOURTH AMENDMENT RIGHTS.

It is imperative that key factual distinctions between the circumstances surrounding the warrantless search in Belton and Robbins and the instant case be made. Without an understanding of those distinctions it is quite understandable how New York v. Belton, 101

S. Ct. 2860 __ U.S. __ (1981), would appear to be analagous to the instant case.

In New York v. Belton, Id., a lone policeman stopped a speeding vehicle on the New York Thruway. When the policeman stopped the vehicle he discovered that none of the occupants either owned the vehicle or were related to the owner. In plain view on the floor of the vehicle was an envelope marked "supergold." Associating this with marijuana, he directed the men to get out of the car and placed them under arrest. He then "split them up into four separate areas of the thruway at this time so they would not be in physical touching area of each other." Belton, 101 S. Ct. at 2862. After confirming his suspicion that the envelope contained marijuana, the officer gave the arrestees the warning required by Miranda v. Arizona, 384 U.S. 436. The policeman then searched the passenger compartment of the car. On the back seat he found a black leather jacket belonging to Belton. He unzipped one of the pockets of the jacket and discovered

cocaine. Placing the jacket in his automobile, he drove the four arrestees to a nearby police station." Belton, 101 S. Ct. at 2862. In Robbins v. California, 101 S. Ct. 2841 __ U.S. __ (1982), a California Highway Patrol Officer stopped an individual driving a station wagon because he had been driving erratically. The police officer got out of his vehicle, approached the Robbins' vehicle and asked Robbins for his registration. When Robbins opened the car door, the officer smelled marijuana smoke. The officer's pat-down search of Robbins yielded a vial of liquid. Upon searching the passenger's compartment, the officer found marijuana as well as equipment for using it.

"After putting the petitioner in the patrol car, the officer opened the tailgate of the station wagon, located a handle set flush in the deck, and lifted it up to uncover a recessed luggage compartment. In the compartment were a tote bag and two packages wrapped in green opaque plastic. The police

unwrapped the packages; each contained fifteen pounds of marijuana." Robbins v. California, 101 S. Ct. at 2844.

The instant case is unlike Belton because the vehicle in which the petitioner was riding was stopped and surrounded by police vehicles. (T.R., p.80) In Belton, a lone police officer had to contend with four arrestees. In the instant case, four police officers had the petitioner and his co-defendants, (Linders), either under arrest or under their control and away from the van. (T.R., p.85) Further, the article searched in Belton was not a closed container with the arrestee's name on it but a jacket, an item of personal clothing, which could have belonged to any of the arrestees. Further, in Belton, the passenger's compartment was a clearly defined area. The van in the instant case had no trunk, or separate and distinct passenger's compartment as in Robbins.

The record discloses that the lunch box was found either between the passenger and driver's seat, (T.R., p.118), or just behind

the passenger's seat. (T.R., p.144) However, the petitioner asserts that where the lunch box was found is not dispositive of whether the police could have searched it without a warrant. The petitioner asserts that; (1) he had a legitimate expectation of privacy in the container, (2) the container was not within his immediate "touching" area at the time it was opened, (3) he was under custody, and (4) he never consented to the warrantless search of his lunch box and therefore the evidence seized should have been suppressed.

What an individual "seeks to preserve as private even in an area accessible to the public may be constitutionally protected. See Rios v. United States, 364 U.S. 253, 80 S. Ct. 1431, 4 L.Ed.2d 1688, (1964); Ex Parte Jackson, 96 S. Ct. 727, 733, 24 L.Ed.2d 877 (1976); "Katz v. United States, 88 S. Ct. 507, 511, 389 U.S. 347 351, (1967), "That amendment protects people and their effects and it protects those effects whether they are "personal" or "impersonal." Once placed within such a container,

a diary and dishpan are equally protected by the Fourth Amendment." Robbins, 101 S. Ct. at 2846.

Petitioner asserts that the Kentucky Court of Appeals' simplistic distinction between Belton and Robbins, based on the location of the container, i.e. whether it is in the trunk or in the passenger's compartment, ignored the Fourth Amendment principle of an individual's legitimate expectation of privacy in personal containers. Simply becuase an individual is not fortunate enought to have a separate trunk compartment in his vehicle should not lessen the legitimate expectation of privacy he may expect the police to honor in containers found within the vehicle. The Belton and Robbins decisions were issued in hope that once-and-for-all there would be a clear line for the police and individuals to follow in order to determine what could and could not be legally and warrantlessly searched.

However, neither Robbins nor the Belton decision has apparently helped to clear the

murky waters of warrantless searches of automobiles. In fact, Belton's decision has been criticized by at least one constitutional scholar.

Professor LaFave's Search and Seizure, A Treatise on the Fourth Amendment, (1980), criticized the Belton decision. Professor LaFave, in discusssing Robbins approvingly, sided with Justice Brennan in his fears over the Belton decision. Professor LaFave founded his criticism on three factors. First, Belton did not state how long after the suspects arrest the search of the vehicle could be validly conducted. Secondly, the Belton decision did not enumerate a standard viz a viz the arrestee's physical proximity of the passenger's compartment. Thirdly, he feared that the rule might be subject to manipulation and abuse in that police might make custodial arrests which they otherwise might not make as a cover for a search which the Fourth Amendment might prohibit.

At first blush, it would appear that

Belton gives law enforcement officers carte blanche to search the entire passengers compartment of an automobile as well as any "container" found therein. However, the petitioner notes that the Court in Belton reached its conclusion concerning the passenger's compartment because:

> "It follows from this conclusion that the police may also examine the contents of any container found within the passenger compartment, for is the passenger compartment is within reach of the arrestee so also will containers in it be within his reach." Belton, 101 S. Ct. at 2864.

Petitioner asserts that Belton and Robbins can be read consonantly. But that consonance is not based on the simplistic delineation of the location of the container, i.e. trunk or passenger's compartment. Rather, the distinction is based on whether the arrestee could reach or lunge into the area sought to be searched and reach the container which the police might seize. As the Court noted in Belton:

> Our holding today does no more than determine the meaning of Chimel's principles in this particular and problematic content. It in no way alters the fundamantal principles

established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrest." Belton, 101 S. Ct. at 2864.

Thus, petitioner contends that Chimel v. California, 395 U.S. 752, 89 S. Ct. 2034, 23 L.Ed.2d 685, (1969), provides the framework upon which Belton and Robbins may be consonantly read. Although Chimel did not deal with a search of an automobile, its basic principle is that:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control." Chimel, 89 S. Ct. at 2040, 395 &.S. 765, 763 (1969)

Petitioner asserts that the basic consti-

tutional safeguards' accorded the contents of Robbins opaque plastic bag should similarly have been accorded to petitioner's lunch box. The lunch box was not suspicious. (T.R., p.132), and therefore did and does not fall under the exception enumerated in Robbins.

Petitioner asserts that the "container" in Belton was not a container but a jacket, a personal effect, susceptible to search under Terry v. Ohio, 87 S. Ct. 2050, 387 U.S. 929, 18 L.Ed.2d 989 (1968). However, this contention is apparently abhorant to footnote four of New York v. Belton, wherein the Court defined container as:

> "Container here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other recepticles located anywhere within the likes. Our holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk." New York v. Belton, at 2864, fn.4

Thus, the underlying purpose of this Court's decision in Belton and Robbins was to for-once-and-for-all set out definite guidelines which would make it easier for law enforcement

officers to decide in which instances they could and could not search an automobile and its contents. However, petitioner asserts that unless the Court clearly addresses and enumerates Chimel's "immediate control" as the underlying raison d'etre for Belton that the rule will be mechanically applied based on a passenger/compartment trunk distinction.

II.

THE DECISION BELOW APPLYING NEW YORK V. BELTON TO THIS CASE PRESENTS A NOVEL QUESTION OF RETROACTIVITY WHICH IS AN IMPORTANT CONSTITUTIONAL QUESTION IN THE ADMINISTRATION OF JUSTICE. ACCORDINGLY, PETITIONER REQUESTS THIS COURT TO GRANT CERTIORARI TO REVIEW THE JUDGMENT BELOW.

This Court's decision in United States v. Peltier, 422 U.S. 531, 95 S. Ct. 2313, 45 L.Ed.2d 374 (1975), expressly addressed the question of retroactivity in the context of the exclusionary rule. In Peltier, this Court considered the retroactive application of the decision in Almeida-Sanchez v. United States, 413 U.S. 266, 98 S. Ct. 2535, 3 L.Ed.2d 596 (1973), which had held warrantless searches without probable cause to be unconstitutional

and had "broadened" an existing exclusionary rule. United States v. Peltier, supra, 95 S. Ct. at 2313. This Court recognized that the search in Peltier was concededly illegal under Almeida-Sanchez, but held "that the exclusionary rule should not be mechanically applied . . . because the policies underlying the rule do not justify its retroactive application to pre-Almeida-Sanchez searches." Peltier, 95 S. Ct. at 2316. This Court reached its decision after concluding that neither of the two major purposes of the exclusionary rule -- the deterrence of unlawful police conduct and "the imperative of judicial integrity" -- would be served by excluding evidence that "law enforcement officers reasonably believed in good faith" to be admissible even if later decisions "broadened the exclusionary rule to encompass evidence seized in that manner." Id., 95 S. Ct. at 2317. This Court held that whether the exclusionary rule should be applied in a case raising a question of retroactivity "depends on whether consideration of either judicial

integrity or deterrence of Fourth Amendment violations are sufficiently weighty to require that the evidence obtained [by the illegal search] be excluded." Id., 95 S. Ct. at 2318.

It is well recognized that this "Court need not have applied a well-settled constitutional principle to every fact situation before its decisions are entitled to retroactive effect." United States v. Schleis, 582 F.2d 1166 at 1174, (8th Circuit, 1978) However, "In appropriate case the court may in the interest of justice make rules prospective and there is much to be said in favor of such rule for cases arising in the future." Linkletter v. Walker, 8t S. Ct. 1731, 381 U.S. 618, 14 L.Ed.2d 23, 601 (1965) In deciding whether to give a rule retroactive effect, the Court has proceeded to "weight merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Linkletter, supra, 85 S. Ct. at 1738.

Additional criteria guiding resolution of the question of retroactivity of new constitutional rules of criminal procedures "implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of the retroactive application of the new standards." Stovall v. Denno, 388 U.S. 293, 297, 87 S. Ct. 1967, 1970, 18 L.Ed.2d 1199 (1967) Further, "the decision to reapply non-retroactivity must establish a new principle of law, either by overruling clear post precedent on which litigants may have relied . . . or by deciding an issue of first impression where resolution was not clearly foreshadowed." Chevron Oil Company v. Huson, 404 U.S. 97 106, 92 S. Ct. 349, 355, 39 L.Ed.2d 296, (1971). See also Desist v. United States, 394 U.S. 244, 248, 89 S. Ct. 1030, 1031-1032, 22 L.Ed.2d 248 (1969), ("a clear break with the past"); Milton v. Wainwright, 407 U.S. 371, 381 n.2 92 S. Ct. 2174, 2180, 33 L.Ed.2d 1 (1973)

(Stewart, J. dissenting) ("a sharp break in the web of the law.") In applying these criteria, this Court has held "to the course that there is no inflexible constitutional rule requiring in all circumstances either absolute retroactivity or complete prospectivity for decisions construing the broad language of the Bill of Rights. Williams v. United States, 91 S. Ct. 1148, 1151, 401 &.S. 647, 651 (1971)

In the instant case, the law governing searches of containers had been enumerated in United States v. Chadwick, 97 S. Ct. 2476, U.S. 2476 (1977), and Arkansas v. Sanders, 99 S. Ct. 2586, 442 U.S. 753 (1979). Only six weeks before oral arguments were heard in the instant case, (App. p. A1), did this Court issue its opinions in New York v. Belton, supra, and Robbins v. California, supra.

In Chadwick, this Court granted certiorari "to decide whether a search warrant is required before federal agents may open a locked footlocker which they have lawfully seized at the time of the arrest of its owner when there is

probable cause to believe the footlocker contains contraband." Chadwick, 97 S. Ct. at 2479. The Court found that "there being no exigencies, it was unreasonable for the government to conduct this search without the safeguards a judicial warrant provides," Chadwick, 97 S. Ct. at 2483, because "a person's expectation of privacy in personal luggage are substantially greater than in an automobile." Chadwick, 97 S. Ct. at 2484. In Arkansas v. Sanders, supra, this Court clarified Chadwick and held that in the absence of exigent circumstances the police were required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched.

Readily discernable is the fact that Belton and Robbins substantially altered the course of prior case law. The purpose to be served by the new law is to allow police officers to search automobiles more thoroughly.

The novelty of the question presented is whether a narrowing of the exclusionary rule's scope entitles an individual to rely on past

Fourth Amendment case law or whether he is to be judged by the newest standard. This issue is best addressed by evaluating the criteria enumerated above.

Uncontravertably, Belton's standard established a new standard for searches of automobile compartments. A reasonable reading of footnote four of Belton indicated to the Court below that the question of an individuals legitimate expectation of privacy no longer controlled the question of whether a "container" could be searched. Rather, the location of, (and not the arrestees proximity to), the container controls the question of whether or not the container could and can be searched without a warrant.

Petitioner asserts that when the new standard is examined in light of the Stovall criteria that the Belton decision should not be retroactively applied. The purpose to be served by the new rule is to narrow the exclusionary rule. In the past, this Court has held that when a new rule broadened the exclusionary

rule then the Court analyzed the police officer's good faith reliance on the old standard. Peltier, 422 U.S. at 2320. The Belton decision did not broaden the exclusionary rule; it narrowed it. This court has held in some instances that the right of an accused to retroactive application in a new Supreme Court rule is not to be given strong consideration. See Foster v. California, 89 S. Ct. 1127, 394 U.S. 440, 22 L.Ed.2d 402 (1969) (line up without counsel present)

Petitioner proposes that the second Stovall criteria should not center around the reliance by law enforcement officers on the old standard, but rather the individual's reliance on the old standard. If ignorance of the law is no defense and if the law enforcement officers are charged with knowledge of the law, then an individual should be able to assume that his Fourth Amendment rights will be accorded the state-of-the-art protection, i.e. Arkansas v. Sanders, 99 S. Ct. 2586, 442 U.S. 753 (1979), and United States v. Chadwick, 97 S. Ct. 2476,

U.S. 2476, (1977). The effect on the administration of justice, from an individual rights point of view, of a retroactive application of Belton would be a catastrophic blow to individuals' Fourth Amendment rights. The instant case should have been decided on the basis of the case law as it existed prior to the Belton decison. To rule otherwise would nurture disrespect for law and order because the general citizency would not know when the law was going to change and under what standard they were to be judged. Therefore, the Kentucky Court of Appeals erred in retroactively applying Belton to the instant case. It also erred when it improperly applied the pre-Belton standards of consent to search to the instant case.

The tip which Officer Carr had received was from a heretofore unsubstantiated source. (T.R., p.98) However, the information which the informant provided was corroborated because two hippy-types driving a white van with Illinois license plates were in Barkley Park at approximately noon and there were drugs

found on the driver of the van. The petitioner asserts that when the van was immediately placed under the police's control that a search warrant should have been sought because the police now had sufficient probable cause to obtain the warrant. Further, the van no longer had the characteristic of being inherently mobile, whichwas the basis for the exigent circumstances exception to the Fourth Amendment. It was surrounded by police cars and was immediately towed into the station. Thus, the respondent cannot rely on the exigent circumstances exception to the Fourth Amendment as a basis for allowing the warrantless search of the van.

The trial court found as a second basis for admitting the evidence that the search was a "consental" search. A clear reading of the record reveals that the consent granted was limited to looking inside the van, i.e. plain view, and not to a general search of the van and its contents. (T.H., p.42)

Preliminarily, when the consent was allegedly given, Mr. Linders was under arrest and

in custody. Further, he was not advised that he could withhold his consent. (T.R., p.102) Whether or not an individual has been advised of his right to withhold consent, as a factor in determining whether or not he knowingly consented to a search, was addressed by this Court in United States v. Watson, 96 S. Ct. 829 at 828, 423 U.S. 401 at 424, 425 (1972)

In Watson, the Court found that:

> "There was no overt act or threat of force against Watson proved or claimed. There were no promises made to him or no indication of more subtle coercion that might flaw his judgment. He had been arrested and was in custody, but his consent was given while on a public street, not in the confines of a police station. Moreover, the fact of custody alone has never been enough in itself to demonstrate a coerced confession or consent to search. Similarly, under Schneckloth, the absence of proof that Watson knew he could withhold his consent may have been a factor in the overall judgment, it is not to be given controlling significance. There is no indication in the record that Watson was a newcomer to the law, mentally deficient, or unable in a face of custodial arrest to exercise a free choice. He was given Miranda warnings and was further cautioned the results of the search of his car could be used against him. He persisted in his consent. In these circumstances, to hold that illegal coercion is made out from the fact of

> the arrest and failure to inform the arrestee that he could withhold consent could not be consistent with Schneckloth and would distort the voluntary standard that we re-affirmed in that case." Watson, 96 S. Ct. at 828.

In the instant case, the petitioner was not given his Miranda warning and was not cautioned that the results of the search of his car could be used against him. (T.R., p. 102) More importantly, the petitioner was never asked, nor did he ever give permission, to have his lunch box opened. (T.R., pp. 84, 140, & 224) The question therefore becomes whether petitioner's co-defendant, assuming that the co-defendant voluntarily consented to the search of the van, could consent to the search of the petitioner's lunch box. See, Frazier v. Cupp, 89 S. Ct. 1420, 394 U.S. 731, 22 L.Ed.2d 684 (1969), and United States v. Matlack, 94 S. Ct. 988, 415 U.S. 164, 39 L.Ed. 2d 242 (1974)

At trial, the Commonwealth relied heavily on the fact that the petitioner's name appeared conspicuously on the lunch box. They, there-

fore, were asking the jury to make a logical inference that the lunch box belonged to the petitioner. If the petitioner's name was so conspicuously placed on the lunch box as to leave no doubt in the reasonable person's mind that the lunch box belonged to the petitioner, then the police should have asked the petitioner for his permission to search his lunch box. The Commonwealth cannot at trial rely upon the fact that the lunch box was obviously the petitioner's and inconsistently argue that his name was not so conspicuously on the lunch box that the police could not have seen it at the time that they seized the lunch box. The exigencies of the circumstances did not require that they open the box, which was in their exclusive control. Thus, in a search incident to a lawful arrest, the Court must assert that whenever practicable the police must obtain advance judicial approval of search and seizure through the judicial process. Chimel, 89 S. Ct. 2034, 395 U.S. 752, 23 L.Ed.2d 685, (1969)

While the Kentucky Court of Appeals never

addressed the issue of the retroactive application of Belton, the question of retroactive aplication vel non, of Belton, is a significant federal question which should be addressed by this Court. See Boynton v. Virginia, 364 U.S. 454, 457, 81 S. Ct. 182 5 L.Ed.2d 296, (1960). An alternate course would be to remand this instant case to the Kentucky Court of Appeals to consider the question of whether or not Belton may be retroactively applied. See 28 U.S.C. § 2106, ("authorizing this Court to require such further proceedings to be had as may be just under the circumstances.")

CONCLUSION

For the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Kentucky Court of Appeals.

Respectfully submitted,

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1010 CITIZENS BANK BLDG.
PADUCAH, KY 42001

TOD D. MEGIBOW
COUNSEL FOR PETITIONER
1021 CITIZENS BANK BLDG.
PADUCAH, KY 42001

Appendix

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981

LARRY D. BROCK — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

APPENDIX

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COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

ORDER SETTING ORAL ARGUMENT

IT IS HEREBY ORDERED that the following cases are scheduled for Oral Argument at the place, date, and the local prevailing time designated.

If you desire to waive oral argument, an agreement of all the parties shall be filed with the Court within seven days of the date of this Order. It is understood that a waiver of oral argument will not be construed as any indication of the merits or the importance of your case and may expedite a decision by the Court.

A motion to change the scheduled date for oral argument must be supported by a detailed, factual affidavit and filed with the Court within seven days of the date of this Order.

Each party shall be given FIFTEEN minutes for the presentation of their case. Counsel shall assume the Panel has read all of the Briefs filed in the case and is familiar with the record. The time limitations are subject to modification by the judges of the Panel at the time of oral argument.

Additional citations of relevant decisions rendered after the filing of your brief may be submitted to the panel at oral argument. Proof of service to opposing counsel shall be made one week prior to the hearing.

ENTERED: JUNE 11, 1981 /s/ John P. Hayes
JOHN P. HAYES, CHIEF JUDGE

AUGUST 6, 1981 - 1:30 - #80-1204 - LARRY D. BROCK V. COMMONWEALTH OF KENTUCKY

OPINION RENDERED: September 25, 1981; 10:00 a.m.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY

COURT OF APPEALS

NO. 80-CA-1204-MR

LARRY D. BROCK — APPELLANT

APPEAL FROM McCRACKEN CIRCUIT COURT
VS. HONORABLE LLOYD C. EMERY, JUDGE
NO. 79-CR-052

COMMONWEALTH OF KENTUCKY — APPELLEE

AFFIRMING

****

BEFORE: HOGGE, HOWARD AND McDONALD, JUDGES.

HOWARD, JUDGE. Larry Brock appeals from a conviction for trafficking in a Schedule III controlled substance. He contends on appeal that the trial court erred in denying his motion to suppress evidence obtained pursuant to a warrantless search of a vehicle and that his motion for directed verdict should have been granted. We affirm.

According to testimony at the suppression hearing and at trial, Officer Robert Carr, a narcotics officer with the Paducah City Police, received information from a confidential infor-

mant that a white van with Illinois license plates, carrying two "hippy-like" persons would be in Barkley Park within the hour to participate in a drug sale. Officer Carr further testified that the informant told him that the driver of the van would have drugs in the front of his pants. Officer Carr also testified that he knew the informant from past conversations regarding the informant's desire to provide information, knew that the Kentucky State Police considered the informant reliable, and that he knew the informant had been used successfully in the past.

Officer Carr received this information at about 11:00 a.m., briefed Officers Pugh, Carter and Midyett at approximately 11:00. Officer Pugh spotted the van in Barkley Park at the time specified by the informant. It had two occupants and Illinois license plates. Pugh pulled the van over for rolling through a stop sign and crossed the center line. Officer Carter then arrived on the scene and received permission from the driver of the van,

one Linders, to search the van. Linders accompanied Carter through the van. On emerging, Officer Carter noticed what appeared to be a hunting knife under appellant Brock's shirt. Carter removed the knife and ran pat-down for further weapons over both Brock and Linders.

The pat-down of Linders revealed a tightly-rolled plastic bag of pills in the front of Linders' pants. Linders was then asked if the pills were all the drugs he had. Carter and Pugh both testified that appellant asked Linders whether he still had the marijuana. Linders replied that he did and pointed out its location to the police. The police asked for and received permission to search the van. (It appears from the record that the van was owned by a woman who was living with Linders at the time of the arrest and who later became Linders' wife.) The marijuana was retrieved and Linders arrested for possession.

During the search a lunch box with the appellant's name on it was found and opened.

It contained a large number of pills subsequently identified by the State Police lab as being schedule III controlled substances.

Linders was taken into custody and appellant was permitted to leave the scene. The van was towed to the police garage.

The trial judge overruled the motion to suppress, finding that the information was reliable, consent was given and that exigent circumstances existed because the van was in a public place only two miles from the Illinois border and because Brock had been released. We agree with the trial court.

Officer Carr testified as to the confidential informant's reliability and prior use of the informant by our State Police. Appellant and Linders appeared in a white van with Illinois plates in the place and at the time specified by the informant.

> [P]robable cause for a search and an arrest without a warrant may be based upon information received through an informant so long as the informant's statement is reasonably corroborated by other matters within the officer's knowledge.

Waugh v. Commonwealth, Ky. App., 605 S.W.2d 43, (1980). The police had probable cause to stop the van. Once the knife was spotted on appellant, a brief pat-down of both appellant and Linders was clearly justified under Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 29 L.Ed.2d 889 (1968). Upon discovery of the pills on linders, Officer Carter testified, Linders gave consent, a second time, to search his van. We find no error in the seizure of the van and lunch box.

Appellant contends that the search of the lunch box itself was impermissible under Arkansas v. Sanders, 442 U.S. 753, 99 S. Ct. 2586, 61 L.Ed.2d 235 (1979), lacking a search warrant. The Commonwealth, relying on the same case, contends that by its very nature, a lunch box is not personal in nature, as is luggage, and that the purpose of a lunch box is to serve as a repository for food, not personal items. See, Arkansas v. Sanders, 61 L.Ed.2d 15 245, fn. 13.

The Supreme Court said in that case that:

> "Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers, (for example a kit of burglar tools or a gun case), by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred."

On July 1, 1981, the United States Supreme Court rendered two opinions directly related to this question. In Robbins v. California, No. 80-148, Criminal Law Reporter, Vol. 29, No. 14, p. 3115, the Court held that the warrantless search of an opaque, sealed package found during the lawful but warrantless search of the trunk of a car violated the Fourth Amendment since the manner in which the package was wrapped evidenced a reasonable expectation of privacy with respect to its contents. Because Robbins involves the search of a car trunk, we do not feel it is applicable to this case.

In New York v. Belton, No. 80-328, Criminal Law Reporter, Vol. 29, No. 14, p. 3124, at 3126, the Supreme Court holds:

> Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact

> generally, even if not inevitably, within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item." . . . Accordingly, we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from that conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have. (Citations omitted)

In Belton, a car was stopped for erratic driving and the occupants were arrested for possession of marijuana. After they were removed from the car, the passenger compartment was searched and a jacket belonging to one of the occupants was found. Inside a zippered jacket pocket a quantity of cocaine was discovered. Belton is clearly analagous to the case at hand.

It has been suggested that the standards for an automobile search are more stringent

in Kentucky. This assertion is based on Wagner v. Commonwealth, Ky. 581, S.W.2d 352 (1979) However, Wagner did not involve a search contemporaneous with a custodial arrest. There, the automobile driver was taken to the police station, questioned, then arrested. Only then was the car impounded and searched.

Further, we must keep in mind that in this case, permission to search the van was given to the police prior to the search.

> If the police have probable cause to believe that the vehicle contains evidence or constitutes a fruit of instrumentality of a crime they must procure a warrant in order to conduct a search in the absence of the consent of the owner or permissive user. Id., Wagner, at 357.

For the foregoing reasons, we hold that the search of the lunch box was permissible and the contents of the box properly admitted into evidence.

As to appellant's contention that the court erred in refusing to grant a motion for directed verdict, our Supreme Court, in Campbell v. Commonwealth, Ky., 564 S.W.2d 528, 530 (1978), has said:

> A motion for a directed verdict of acquittal should only be made (or granted) when the defendant is entitled to a complete acquittal - i.e. when, looking at the evidence as a whole, it would be clearly unreasonable for a jury to find the defendant guilty, under any possible theory, of any of the crimes charged in the indictment of or any lesser included offenses. (Emphasis in the original).

The trial court acted properly both in denying the suppression of evidence and in denying the motion for directed verdict. The judgment is therefore affirmed.

ALL CONCUR.

ATTORNEY FOR APPELLANT:

Tod D. Megibow

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Office of the Clerk
SUPREME COURT OF KENTUCKY
State Capitol Frankfort, 40601

October 14, 1981

JAMES W. OWENS, Esq.
P. O. Box 2755
Paducah, Kentucky 42001

RE: LARRY D. BROCK VS.
COMMONWEALTH OF KENTUCKY
FILE NUMBER 81-SC-738-D
(C. of A. #80-CA-1204-MR)

Dear Mr. Owens:

Pursuant to CR 76.20, your Motion for Discretionary Review has been filed as of the above date.

Section (5) of this Rule provides each respondent may file a response within twenty (20) days.

Sincerely,

JOHN C. SCOTT
CLERK

BY: /s/ John C. Scott

JCS:lc

cc: Tod D. Megibow, Esq.
Clerk, Court of Appeals
Honorable Steven Beshear
File

SUPREME COURT OF KENTUCKY
81-Sc-738-D
(80-CA-1204-MR)

LARRY D. BROCK MOVANT

VS. McCRACKEN CIRCUIT COURT
#79-CR-052

COMMONWEALTH OF KENTUCKY RESPONDENT

ORDER DENYING MOTION FOR DISCRETIONARY REVIEW

The motion of Larry D. Brock for a review of the decision of the Court of Appeals is denied.

ENTERED February 9, 1982.

/s/ James S. Palmore
Chief Justice

McCRACKEN CIRCUIT COURT
DIVISION NO. I

COMMONWEALTH OF KENTUCKY,	]	FINAL JUDGMENT
	]	
PLAINTIFF,	]	SENTENCE OF IMPRISONMENT
	]	
VS.	]	INDICTMENT NO. 79-CR-052
	]	
LARRY D. BROCK	]	CHARGE: TRAFFICKING IN A SCHEDULE III CONTROLLED SUBSTANCE
DEFENDANT,	]	

The defendant having been convicted by a jury for Trafficking in a Schedule III Controlled Substance and sentenced by said jury to serve a term in the penitentiary of 10 years and a find of $5,000.

On this 29th day of February, 1980, said defendant appeared in open court with his attorney, Hon. James W. Owens. Whereupon, the Court inquired of the defendant and counsel any legal cause as to why judgment should not be pronounced and afforded the defendant and counsel an opportunity to make statements in the defendant's behalf and to present any information in mitigation of punishment, and

the Court having given due consideration to the pre-sentence report prepared by the Division of Probation and Parole, and the Court having presented said report to defendant and counsel, who read same and discussed it among themselves and were allowed a fair opportunity and a reasonable amount of time within which to controvert the same, and the defendant having made objections thereto, which were noted by the Court and of record in the transcript of sentencing, the Court, having considered probation or conditional discharge, is of the opinion because of the dangerous nature of defendant's crime that imprisonment is necessary for the protection of the public, because probation or condition discharge will unduly appreciate the seriousness of the defendant's crime.

No sufficient cause having been shown why judgment should not be pronounced, sentence was imposed upon the defendant, and it is THEREFORE ADJUDGED by the Court that the defendant is guilty of the crime of Trafficking

in a Schedule III Controlled Substance, and that he shall be confined in the State Institution designated by the Bureau of Corrections for the maximum term of ten (10) years at hard labor, and it is further ORDERED that the Commonwealth of Kentucky recover from the defendant the sum of $5,000.

Thereafter, the Court duly notified the defendant and counsel of defendant's right to file a notice of appeal within 10 days and that said notice may be made by defendant's counsel or by the defendant himself, or this said defendant may instruct the Clerk to file such notice of appeal.

/s/ LLOYD C. EMERY
JUDGE, McCRACKEN CIRCUIT COURT, DIVISION NO. I

NOTICE:

The foregoing Judgment was entered on the 29 day of February, 1980.

ALFRED OBERMARK, CLERK
McCRACKEN CIRCUIT COURT

By: /s/ ALFRED OBERMARK

The foregoing Judgment was served upon the defendant by mailing a true copy to the Hon. James W. Owens, Attorney of Record, postage prepaid, this 29 day of February, 1980.

By: /s/ ALFRED OBERMARK

Copies also mailed to Ray Larson, Assistant Attorney General, and to Mark Bryant, Commonwealth Attorney.

COMMONWEALTH OF KENTUCKY
McCracken Circuit Court
Indictment No. 79-CR-052

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. NOTICE OF APPEAL

LARRY D. BROCK DEFENDANT

Comes the defendant, Larry D. Brock, by counsel, and for his Notice of Appeal states as follows:

1. The appellant is Larry D. Brock, and the appellee is the Commonwealth of Kentucky.

2. The final judgment being appealed was entered on February 29, 1980, sentencing the defendant/appellant to 10 years imprisonment and a fine of $5,000.00

RESPECTFULLY SUBMITTED,

OWENS, PIERCE, & GRAVES
CHARTERED
730 Clark Street
Paducah, Kentucky 42001

By: /s/ JAMES W. OWENS

ATTORNEYS FOR DEFENDANT

Opposition

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1848

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LARRY D. BROCK - - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - Respondent

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STEVEN L. BESHEAR
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Counsel for Respondent

WESTERFIELD-BONTE CO., 519 W. KENTUCKY—P.O. BOX 2251, LOUISVILLE, KY.

QUESTIONS OF LAW PRESENTED FOR REVIEW

1. Does *New York* v. *Belton*, 101 S. Ct. 2860 (1981) call for a case-by-case adjudication or does *Belton* announce a straight forward rule that allows a police officer, who has made a lawful custodial arrest of the occupant of a vehicle, to conduct a search of the passenger compartment of the vehicle, as a contemporaneous incident of that arrest, to include the contents of a closed container found within the passenger compartment of the vehicle?

2. Should the petitioner be allowed to raise in his petition the issue of the retroactive application of *New York* v. *Belton* when such issue was not raised in any of the state court proceedings below.

LIST OF PARTIES

1. Petitioner is Larry D. Brock. Counsel for petitioner are Hon. Charles M. Chaney and Hon. Tod D. Megibow.

2. Respondent is the Commonwealth of Kentucky. Counsel for respondent are Hon. J. Gerald Henry and Hon. John H. Gray.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

No. 81-1848

LARRY D. BROCK - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - *Respondent*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

May is please the Court:

CITATIONS TO OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

Brock v. *Commonwealth,* Ky. App., 627 S. W. 2d 39 (1981).

Brock v. *Commonwealth,* Supreme Court of Kentucky, No. 81-SC-738-D. Order denying Motion for Discretionary Review. Entered February 9, 1982.

GROUNDS FOR JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law . . .

The Fourth Amendment to the Constitution of the United States as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

At approximately 11:00 A.M. on the morning of August 31, 1978 Officer Robert Carr, a narcotics officer with the Paducah City Police, received information from a confidential informant that the driver of a white van with Illinois license plates and its passenger would be participating in a drug transaction around noon at Barkley Park in Paducah.

Officer Carr knew the informant from past conversations regarding the informant's desire to provide

information, knew that the Kentucky State Police considered the informant reliable, and knew that the informant had been used successfully in the past.

Based on this information Officer Carr met with Officers Pugh, Carter, and Midyett and briefed them at approximately 11:20 A.M. on the information that he had received.

At approximately noon, Officer Pugh spotted and stopped the van in question at Barkley Park for rolling through a stop and because of erratic driving and crossing the center line. Dennis Linders was the driver of the van. Larry Brock was the passenger of the van. Barkley Park is located approximately two miles from the Brookport Bridge which leads over the Ohio River and into Illinois.

Officer Carter then arrived on the scene. Officer Carter asked for and received from Linders, permission to look into the van. According to Officer Carter's testimony he entered the van accompanied by Linders. On emerging from the van Officer Carter noticed what appeared to be a hunting knife under Brock's shirt. Brock was then searched for further weapons, as was Linders.

A "pat-down" search of Linders led to the discovery in the front of his pants, of what the police thought might be another weapon. The object discovered turned out to be a tightly rolled plastic bag of pills.

Linders was then asked if the pills in the bag were all the drugs he had. According to the testimony of Officers Carter and Pugh, Brock asked Linders if he still had the marijuana, and Linders replied that he

did. The police then asked again for and received permission to search the van. The marijuana was pointed out to them and the police went into the van to retrieve it. Linders was then placed under arrest for the possession of marijuana.

Upon further search of the van, contemporaneous to the custodial arrest, the police found a lunch box in the passenger compartment of the van, bearing the name of Larry Brock. The lunch box was opened and found to contain a number of pills. The pills were subsequently identified by the State Police Lab as being Schedule III Controlled Substances.

Linders was then taken downtown under arrest and Brock permitted to leave the scene. The van was thereafter towed to the police garage.

Brock sought to have the evidence taken from the van suppressed. A suppression hearing was therefore held on January 24, 25, 1980. At the hearing the trial judge overruled Brock's motion to suppress the evidence, stating:

> I'm going to overrule your motion on the following basis: First of all, I find there to be probable cause for the wanting to search due to the reliability of the C.I., that has already been determined and, secondly, due to the statements that were made by the individuals at the scene at the time of the stop and, thirdly, I find the exigent circumstances to exist by the fact that we're dealing with moveable automobile or van located in a place where it could be tampered with not only by people who have nothing to do with the van,

> vandals, third parties, whatever, but also subject to being re-entered by what I assume to be an accomplice, one Brock. All those things taken into consideration lead me to believe there was a valid search made at the scene of the stop, and I am going to overrule your motion to suppress.

Brock was thereafter tried by jury, convicted of trafficking in a Schedule III controlled substance and sentenced to 10 years imprisonment and a fine of $5,000.

Brock appealed his conviction arguing:

1. That the trial court erred in failing to suppress the evidence taken from the lunch box.

2. That the trial court erred in failing to direct a verdict of acquittal in his favor.

The Kentucky Court of Appeals affirmed Brock's conviction because the search was valid under *New York* v. *Belton* and because consent to search had been given.

Brock then moved the Kentucky Supreme Court for discretionary review, raising the following questions of law:

1. Whether the Kentucky Court of Appeals properly applied the "Bright Line Rule" of *Robbins* v. *California* and *Belton* v. *New York*.

2. Whether the Kentucky Supreme Court should allow the Kentucky Court of Appeals to misinterpret United States Supreme Court Jurisprudence.

The Kentucky Supreme Court denied discretionary review. This petition followed.

REASONS FOR DENYING REVIEW

Petitioner advances the following reasons for granting review:

1. The Kentucky Court of Appeals improperly applied *New York* v. *Belton.*

2. The Kentucky Court of Appeals improperly gave *New York* v. *Belton* retroactive application.

The respondent submits that neither of the reasons advanced by petitioner provides adequate grounds for this Court granting review, in that:

1. The Kentucky Court of Appeals properly determined that when the police have made a lawful arrest of the occupant of a vehicle, the police may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile, to include any closed containers found within the passenger compartment.

2. The Kentucky Court of Appeals found as an alternate reason for upholding the search in question, that consent to search had been validly given.

3. The question of the retroactive application of *New York* v. *Belton* was not raised in any of the state courts below and thus should not be heard for the first time by this Court.

For these reasons, review should not be granted.

ARGUMENT

1. Appellant first argues that the Court of Appeals of Kentucky misapplied *New York* v. *Belton,* 101 S. Ct. 2860 (1981).

New York v. *Belton*, states:

> . . . we hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as contemporaneous incident of that arrest, search the passenger compartment of that automobile.
>
> It follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach. . . . Such a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justified the infringement of any privacy interest the arrestee may have. footnotes and citations omitted. 101 S.Ct. at 2864.

Although petitioner does not contest the validity of the custodial arrest in this case, petitioner does claim that his case should not be governed by *New York* v. *Belton,* because:

1. The vehicle in which the petitioner was riding was stopped and surrounded by police vehicles. In *Belton,* a lone police officer had to contend

with four arrestees. In the instant case, four police officers had the petitioner and his co-defendant, (Linders), either under arrest or under their control and away from the van.

2. The article searched in *Belton* was not a closed container with the arrestee's name on it but a jacket, an item of personal clothing, which could have belonged to any of the arrestees.
3. In *Belton,* the passenger's compartment was a clearly defined area. The van in the instant case had no trunk, or separate and distinct passenger's compartment as in *Robbins.*
4. Because he and the other occupant of the vehicle were out of and away from the van and under the control of the police, the lunch box found within the van was out of their "touching" area and thus not within the area of their immediate control.
5. He had a Fourth Amendment expectation of privacy in his lunch box.

Petitioner is suggesting that *Belton* requires a case-by-case adjudication approach rather than the application of a workable rule. *Belton,* though, clearly rejected the case-by-case adjudication approach in favor of a straight forward rule, easily applied, and predictably enforced. The rule announced by *Belton* is "that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." Since the case at bar involved a search incident to a lawful arrest,

the Kentucky Court of appeals properly applied the *Belton* rule to petitioner's case.

Since petitioner has not shown that the Court of Appeals of Kentucky misapplied *Belton,* review should not be granted.

2. Petitioner next argues that this Court should grant review to determine if the Court of Appeals of Kentucky improperly gave *New York* v. *Belton* retroactive application.

This raises an issue not raised before in any of the Kentucky Court proceedings below. Ordinarily, this Court does not decide questions not raised or resolved in lower courts. *Youakim* v. *Miller,* 96 S. Ct. 1399, 425 U. S. 231 (1976). Since petitioner did not raise this issue in any of the lower courts, this Court should not now grant review to hear this issue.

Although petitioner now claims that the Kentucky Court of Appeals improperly gave *Belton* retroactive application, it was the petitioner himself who at oral argument first urged the Kentucky Court of Appeals to consider *Belton* as it related to his case. Again, in his motion to the Kentucky Supreme Court for discretionary review petitioner urged the court to consider *Belton* as it related to his case. Although, in both Kentucky courts, petitioner was arguing that *Belton* was not analogous to his case, the fact remains that petitioner urged each court to consider *Belton* in deciding his case, since petitioner himself first cited *Belton* and argued for its consideration in both Kentucky courts, he should not now be allowed to claim

that *Belton* was improperly given retroactive application.

Since the issue of Kentucky's application of *New York* v. *Belton* was not raised in the courts below, and since the petitioner himself cited *Belton* to the Kentucky courts, this Court should not grant review on the issue of the retroactive application of *Belton*.

CONCLUSION

Since petitioners have failed to demonstrate why review should be granted, the Commonwealth respectfully requests that this petition be dismissed.

Respectfully submitted,

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CERTIFICATE AND PROOF OF SERVICE
AND OF MAILING FOR FILING

I hereby certify that six copies of this Brief in Opposition to Petition for Writ of Certiorari were served upon petitioner by depositing them in a United States mailbox facility with first-class postage prepaid, addressed to Hon. Charles M. Chaney, 1010 Citizens Bank Bldg., Paducah, Kentucky 42001, Counsel of Record for Petitioner, and Hon. Tod D. Megibow, 1021 Citizens Bank Bldg., Paducah, Kentucky 42001, this 5th day of May, 1982. All parties required to be served have been served. Forty copies of this Brief in Opposition to the Petition have been mailed for filing in this Court, addressed to the Clerk of this Court, on the same date and by the same method.

J. GERALD HENRY
Counsel of Record for Respondent